Supreme Court, U.S.
FILED
JUL 10 2000
OFFICE OF THE CLERK

No. 00 54

IN THE

Supreme Court of the United States

YSLETA DEL SUR PUEBLO,
Petitioner,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

THOMAS M. DIAMOND, JR.
DIAMOND RASH GORDON & JACKSON, P.C.
300 East Main Drive
Seventh Floor
El Paso, Texas 79901
(915) 533-2277
Attorneys for Ysleta del Sur Pueblo

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

26 pp

QUESTION PRESENTED

Does the Eleventh Amendment bar suit against a political subdivision of a state simply because the entity possesses powers of government?

In THE

Supreme Court of the United States

No. ———

YSLETA DEL SUR PUEBLO,

Petitioner,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Comes now Ysleta del Sur Pueblo, a federally recognized Indian tribe, seeking certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit was entered on April 10, 2000, Appendix at 15a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

OPINIONS BELOW

Neither the order of the United States District Court for the Western District of Texas dismissing the case on jurisdictional grounds, Appendix at 1a, nor the opinion of the Court of Appeals affirming dismissal, Appendix at 17a, are reported.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend XI: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by another State, or by Citizens or Subjects of a Foreign State.

Tex. Const. art. 16 § 59(b): [Conservation and reclamation districts] shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions . . . as may be conferred by law.

STATEMENT OF THE CASE

The Pueblo brought suit in federal court to eject El Paso County Water Improvement District No. 1 ("EPCWID") from real property occupied by EPCWID's administrative office and service yard. The Pueblo alleged legal title to the property pursuant to a 1751 grant from the Kingdom of Spain as well as an aboriginal right to possess the property, both the fee interest and usufructuary right being inalienable under the Indian Non-Intercourse Act, 25 U.S.C. § 177. EPCWID is a political subdivision of the State of Texas, organized under section 59(b) of Article 16 of its Constitution.

The District Court dismissed the Pueblo's suit for lack of jurisdiction. Appendix at 14a. The District Court first determined that the Eleventh Amendment barred the Pueblo's claims if asserted against the state. The District Court then

found that Texas is the real party in interest in this suit. The District Court acknowledged the existence of the Fifth Circuit's six-factor test to determine whether the state is the real party in interest in a lawsuit brought against an agency of the state. The District Court did not apply the test, however, finding that the "bright-line" test established in *Pillsbury Co. v. Port of Corpus Christi*, 66 F.3d 103, 104 (5th Cir. 1995), cert. denied, 517 U.S. 1203 (1996), mandates that entities created and operating pursuant to section 59 of article 16 of the Texas Constitution, such as the EPCWID, be accorded Eleventh Amendment immunity. Appendix at 14a.

Citing its decision in *Pillsbury* at 104, and its decision in *Kamani v. Port of Houston Authority*, 702 F.2d 612, 613 (5th Cir. 1983), the Court of Appeals affirmed the order of the District Court. Appendix at 18a.

ARGUMENT

The Fifth Circuit's "bright-line" test—that a political subdivision of the state which possesses powers of government also enjoys Eleventh Amendment immunity—is contrary to the decisions of this Court, other circuits, and its own precedents.

Although the Eleventh Amendment bar encompasses actions against state instrumentalities, courts must first decide as a matter of federal law whether a particular entity has the same kind of independent status as a county or is instead an arm of the state. *Regents of the University of California v. Doe*, 519 U.S. 425, 429-430 (1997). The Fifth Circuit developed a six-factor test in *Jacintoport Corp. v. Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985), to determine whether an entity is the alter ego of the state:

> (1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of the funds for the entity; (3) the degree of local autonomy the entity

> enjoys; (4) whether the entity is concerned primarily with local, as opposed to state-wide problems; (5) whether the entity has authority to sue and be sued in its own name; and, (6) whether the entity has the right to hold and use property.

See *McDonald v. Board of Mississippi Levee Commissioners*, 832 F.2d 901, 906 (5th Cir. 1987)(citations omitted).

Applying the *Jacintoport* test to EPCWID in the same manner as applied by the Fifth Circuit to the Board of Mississippi Levee Commissioners in *McDonald* demonstrates that EPCWID is less entitled to the Eleventh Amendment immunity which was denied the Board in the Mississippi case. The Fifth Circuit refused to apply the *Jacintoport* test, however, because of the "bright-line" test it previously established in *Pillsbury*.

The decision in *Pillsbury* "reaffirmed" the holding in *Kamani* that entities created under section 59 of article 16 of the Texas Constitution are entitled to Eleventh Amendment immunity.[1] The Court based its decision in *Kamani* on its prior description of an entity created under section 59 as "a creature of state law and a political subdivision of the State of Texas." See *McCrea v. Harris County Houston Ship Channel Navigation District*, 423 F.2d 605, 607 (5th Cir.), cert. denied, 400 U.S. 927 (1970).[2] The statement is a truism shedding no light on Eleventh Amendment issues.

The Texas Supreme Court had previously determined that an entity existing and operating under section 59 "is a governmental agency and body politic, governed by the laws applicable to counties." *Bennett v. Brown County Water Improvement District No. 1*, 272 S.W.2d 498, 502 (Tex. 1954).

---

[1] The issue in *Kamani* was whether plaintiff complied with the notice provision of the Texas Tort Claims Act. See 702 F.2d at 615-616.

[2] The issue in *McCrea* was whether defendant was a "common carrier by railroad" as defined by the Federal Employers Liability Act. See 423 F.2d at 606.

The Texas Supreme Court went on to hold that the water district is immune from suit in state court because counties in Texas enjoy such immunity. *Id.* at 502. The Eleventh Amendment, however, does not bar suits against the counties of Texas. See *Crane v. Texas*, 759 F.2d 412, 415-416 (5th Cir.), amended on denial of rehearing, 766 F.2d 193 (5th Cir.), cert. denied, 474 U.S. 1020 (1985). The Fifth Circuit's "bright-line" test is in error because powers of government, such as sovereign immunity, is but one of many factors used in determing whether an entity is an arm of the state. Cf., *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999) (the fact that a school district is entitled to state sovereign immunity does not determine extent of Eleventh Amendment immunity).

The decision of the Fifth Circuit permits States to shield their political subdivisions from action in federal court for violation of federal law merely by ascribing "powers of government" to the entities. Form, not substance, becomes the touchstone of the Eleventh Amendment immunity. The "bright-line" test does nothing to protect the sovereign interests of states, but instead frees their political subdivisions to trample the federal rights of their citizens by shutting the doors to the federal courthouse.

CONCLUSION

The Pueblo respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

THOMAS M. DIAMOND, JR.
DIAMOND RASH GORDON &
JACKSON, P.C.
300 East Main Drive
Seventh Floor
El Paso, Texas 79901
(915) 533-2277
Attorneys for Ysleta del Sur Pueblo